



January 19, 2018

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

**Re: Electronic Frontier Foundation letter in support of Yelp's request for partial
depublication of *Yelp v. Superior Court*, No. S246424**

Dear Chief Justice Cantil-Sakauye and the Associate Justices of the Court:

Pursuant to Rule 8.1125(b) of the California Rules of Court, the Electronic Frontier Foundation (EFF) submits this letter in support of Yelp's request for partial depublication of *Yelp, Inc. v. Superior Court*, 17 Cal. App. 5th 1, 224 Cal. Rptr. 3d 887 (Cal. Ct. App. 2017) ("Yelp depublication request"). Part II of the decision created unnecessary confusion for litigants and trial courts regarding the First Amendment's protections for anonymous speakers that will potentially embolden efforts to intimidate, harass, or silence those speakers. EFF asks that this Court to depublish Part II of the opinion to maintain the First Amendment's robust protections for anonymous speakers.

I. EFF's Interest in Depublication.

EFF is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 44,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

The issue here—whether the Court of Appeal court gave proper weight to a speaker's anonymity—touches on a significant issue central to EFF's work: the First Amendment's protections for anonymous online speakers. EFF has repeatedly represented anonymous online speakers and appeared as amicus curiae in cases where the First Amendment's protections for anonymous speech are at issue. *See, e.g., USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010) (serving as counsel to Doe); *Signature Management Team, LLC, v. Doe*, 876 F.3d 831 (6th Cir. 2017) (serving as amicus in support of anonymous speaker); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. Sup. Ct. 2015) (amicus); *Doe v. TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (serving as counsel to Doe).¹

Permitting Part II of the *Yelp* decision to remain published will weaken

¹ A complete list of anonymous speech cases EFF has participated in is available at <https://www.eff.org/issues/anonymity>.

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recognized constitutional protections for anonymous speakers and provide fodder for litigation intended to harass these speakers.

II. The Appellate Court’s Decision Created Unnecessary Confusion About First Amendment Protections for Anonymous Speech.

In the Court of Appeal, Yelp sought to stay a trial court’s order enforcing a plaintiff’s subpoena to Yelp for records identifying the author of allegedly defamatory Yelp reviews. The Court of Appeal found that Yelp had standing to assert the anonymous reviewer’s First Amendment rights, but refused to stay the subpoena because it found that the plaintiff alleged facts sufficient to support a prima facie case of defamation by the reviewer. *Yelp*, 224 Cal. Rptr. 3d at 898-900.

The Court of Appeal correctly recognized that the First Amendment protects anonymous speech online, and it relied on *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008), and *ZL Technologies, Inc. v. Does 1-7*, 220 Cal. Rptr. 3d 569, 578 (Cal. Ct. App. 2017), to “resolve ‘a conflict between a plaintiff’s right to employ the judicial process to discover the identity of an allegedly libelous speaker and the speaker’s First Amendment right to remain anonymous.’” 224 Cal. Rptr. 3d at 898 (quoting *ZL Technologies*, 220 Cal. Rptr. 3d at 578). Like numerous courts across the country, these cases require plaintiffs who seek to pierce speakers’ anonymity to produce a sufficient evidentiary basis to support their underlying legal theories before granting their requests to identify the anonymous speakers. *See, e.g., Dendrite Int’l v. Doe No. 3*, 775 A.2d 756, 771 (N.J. App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451, 457 (Del. Sup. Ct. 2005); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. Ct. App. 2009); *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. App. 2007).

However, the Court of Appeal injected unnecessary confusion into the inquiry by also relying on this Court’s opinion in *Williams v. Superior Court*, 398 P.3d 69 (Cal. 2017). As the Court of Appeal itself conceded, *Williams* is not apposite to a case involving anonymous speech. 224 Cal. Rptr. 3d at 899 (recognizing “*Williams* is not directly on point”). Nevertheless, it cited *Williams* for the proposition that “a civil litigant’s right to discovery is broad” including “an entitlement to learn the identity and location of persons having knowledge of any discoverable matter.” *Id.* (citations and quotation marks omitted). But in *Williams*, this Court made clear that the “broad” discovery right applies only “[i]n the absence of privilege” and that disclosure could be limited by statute or public policy. 398 P.3d at 74.

As the weight of authority from California and other jurisdictions indicates, the First Amendment provides both a qualified privilege and strong public policy reasons to limit discovery of anonymous speakers’ identities. *See, e.g., Krinsky*, 72 Cal. Rptr. 3d at

1163-1164 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-342 (1995)). Indeed, “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The ability to speak one’s mind on the Internet without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.” *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d at 1092 (quotation omitted). Given the importance of anonymous speech to the purpose of the First Amendment, it is crucial that these protections be applied with care. *Williams* should not be read to subtract from these protections. Yet the Court of Appeal’s reliance on it creates just such a risk of confusion and, as Yelp shows, litigants are already wrongly interpreting the decision in ways that undercut First Amendment anonymity rights. See Yelp depublication request at 6-8 (discussing cases in which litigants are attempting to avoid their evidentiary burden to pierce speakers’ anonymity).

III. The Appellate Court’s Decision Will Increase the Risk of Harassment of Anonymous Speakers.

The confusion created by the *Yelp* court will likely encourage litigants to unmask anonymous speakers because they do not like the content of their speech. Litigants may seek speakers’ identities to punish or silence them, rather than vindicate substantive rights or pursue legitimate claims. As the court in *Dendrite*, 775 A.2d at 771, recognized, procedural protections for anonymous speakers are needed to ensure that litigants do not misuse “discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet.” Similarly, the court in *Cahill*, 884 A.2d at 457, stated, “there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics.”

When litigants abuse courts’ discovery tools to harass or intimidate anonymous speakers, they cause acute harm in several respects.

First, the disclosure of anonymous speakers’ identities can irreparably and directly harm them. *Art of Living v. Does 1-10*, 2011 WL 5444622 *9 (N.D. Cal. Nov. 9, 2011) (*Art of Living II*). Further, unmasking is harmful to speakers when their true identities are unpopular, as others may be more dismissive of the speakers’ statements, and speakers may be chilled from continuing to speak publicly on that same topic. See *Doe v. Harris*, 772 F.3d 563, 579 (9th Cir. 2014) (anonymity “provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.”) (internal quotations omitted).

Unmasking the speaker can lead to serious personal consequences—for the speaker or even the speaker’s family—including public shaming, retaliation, harassment, physical violence, and loss of a job. See *Dendrite*, 775 A.2d at 771 (recognizing that

unmasking speakers can let other people “harass, intimidate or silence critics”). In the analogous context of identifying individuals’ anonymous political activities, the Supreme Court has recognized how unmasked individuals can be “vulnerable to threats, harassment, and reprisals.” *Brown v. Socialist Workers ’74 Campaign Committee (Ohio)*, 459 U.S. 87, 97 (1982).

Finally, the harm of unmasking a specific speaker also has the potential to chill others’ speech. In *Highfields*, the court held that would-be speakers on an online message board are unlikely to be prepared to bear the high costs of defending against frivolous claims that results from their lawful speech. 385 F. Supp. 2d at 981. Thus, “when word gets out that the price tag of effective sardonic speech is this high, that speech likely will disappear.” *Id.*

EFF has witnessed these tactics and the harm that results firsthand. For example, USA Technologies, Inc. targeted an anonymous Yahoo! message board user, “Stokklerk,” who had characterized the company’s high executive compensation as “legalized highway robbery” and “a soft Ponzi.” Even though USA Technologies could not prove that these posts were anything but constitutionally protected opinion, it issued a subpoena to Yahoo! to uncover Stokklerk’s identity. As counsel for the anonymous speaker, EFF brought a motion to quash. The court agreed, recognizing “the Constitutional protection afforded pseudonymous speech over the internet, and the chilling effect that subpoenas would have on lawful commentary and protest.” *USA Technologies*, 713 F. Supp. at 906.

In another case, Jerry Burd, the superintendent of the Sperry, Oklahoma, school district, sued anonymous speakers who criticized him on an online message board. Burd filed a subpoena seeking to unmask the speakers. When EFF intervened on behalf of the site operator and a registered user, Burd immediately dropped the subpoena. This indicates that Burd did not have a meritorious claim, and presumably was using the legal system simply to unmask the speakers.²

The use of harassing subpoenas is also a common tactic in online copyright infringement litigation. For example, the holders of copyright on adult movies often file mass lawsuits based on minimal evidence of copyright infringement stemming from the downloading of a pornographic film, improperly joining dozens of defendants in a single suit regardless of where their Internet Protocol addresses indicate they live. The copyright holders seek to leverage the risk of embarrassment associated with pornography, as well as the accompanying costs of litigation, to coerce settlement payments of several thousand dollars from each of these individuals, despite serious problems with the

² *Anonymity Preserved for Critics of Oklahoma School Official*, EFF (July 19, 2006), <https://www.eff.org/press/archives/2006/07/18>.

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underlying claims. These suits are rarely litigated to judgment. Once the rights-holders obtain the identities of Internet subscribers through subpoenas to their Internet service providers, the cases generally proceed no further. The D.C. Circuit recognized the illegitimacy of these tactics. See *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014) (criticizing “porno-trolling” tactics targeting anonymous downloaders en masse).³

To curtail the harassment and abuse described above, courts have adopted legal tests that require the parties seeking to pierce speakers’ anonymity to meet some evidentiary burden. This helps deter misuse of courts’ processes to violate individuals’ First Amendment rights. When there is confusion about the parties’ burden to sustain a request to pierce speakers’ anonymity, however, it invites litigants to bring frivolous claims that are designed to harm speakers. In the *Yelp* decision, the Court of Appeal did just that, and harm is likely to result.

IV. Conclusion

For the reasons above, EFF respectfully requests that this Court depublish Part II of the *Yelp* decision.

Sincerely,

/s/ Andrew Crocker
Andrew Crocker
Staff Attorney
Cal Bar. # 291596

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³ In December 2016, federal officials indicted two attorneys who filed many such copyright infringement suits. Officials accuse the pair of committing fraud, perjury, and money laundering as part of a massive extortion scheme that leveraged the fear of being associated with pornography viewing into quick settlements. Joe Mullin, *Prenda Law “copyright trolls” Steele and Hansmeier arrested*, Ars Technica (Dec. 16, 2016), <http://arstechnica.com/tech-policy/2016/12/breaking-prenda-law-copyright-trolls-steele-and-hansmeier-arrested/>.

PROOF OF SERVICE

I, Cynthia Domínguez, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years and not a party to the within action. I am an employee of Electronic Frontier Foundation, and my business address is 815 Eddy Street, San Francisco, California 94109.

On January 18, 2018, I caused to be served the foregoing document(s):

Electronic Frontier Foundation letter in support of Yelp's request for partial depublication of *Yelp v. Superior Court*, No. S246424

on the interested parties in these action as follows:

Please see attached Service List

[X] (ELECTRONIC SERVICE) – I caused a true and correct copy of the foregoing document(s) to be served to the persons and e-mail addresses listed on the following service list via TrueFile.

[X] (VIA FEDEX 2-DAY SERVICE) – I placed a true copy of the foregoing document(s) in a sealed envelope with delivery fees provided for, to be deposited in a box regularly maintained by **Federal Express (FedEx)**.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2018 at San Francisco, California.



Cynthia Domínguez, Declarant

SERVICE LIST

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